In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 324.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA,
Defendant in Error.

In Error to the Supreme Court of the State of Nebraska.

BRIEF OF DEFENDANT IN ERROR ON MOTIONS TO DISMISS AND AFFIRM.

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(16,300)

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This is a mandamus proceeding brought by the city of Omaha, Nebraska, against the Chicago, Burlington and Quincy Railroad Company for the purpose of compelling the latter to make certain repairs to a railway viaduct within the former's corporate limits. The suit was begun in the district court of Douglas county, Nebraska, and taken on error to the supreme court of that state, which affirmed the judgment of the court below in favor of the city. The railroad company thereupon brought the cause before this court on the ground that federal questions were in-

volved and were decided adversely to constitutional provisions. The defendant in error has filed its motion to dismiss the writ of error herein for want of jurisdiction, and united therewith a motion to affirm the judgment of the state court, on the grounds named in rule 6, paragraph 5 of the rules of this court. The brief now submitted is in support of those motions.

STATEMENT OF THE CASE.

In 1869, a corporation called the Omaha and Southwestern Railroad Company was organized in the state of Nebraska, and immediately constructed its line which began in the city of Omaha and ran out into the state in a southwesterly direction. Its sole charter was the general statute law of the state then in force relating to corporations, being Ch. 25, Rev. St. Neb. 1866.

Section 83 of the said statute is especially relied upon in this controversy by the railroad company, as the foundation of its claim that the city has contracted to repair the viaduct in question. It reads as follows:

"Sec. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other

public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

Section 103 of the same chapter is in these words:

"Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, water course or other way."

The property and franchises of the Omaha and Southwestern in 1871 passed by a lease of 999 years to the Burlington and Missouri River Railroad Company, which transferred all its interests to the plaintiff company in 1880.

In 1884 the city council of Omaha passed its ordinance No. 729, relied upon by the plaintiff in error as in some way further supporting its said claim of a contract with the city for viaduct repairs. The ordinance is as follows.

"ORDINANCE NO. 729.

"Sec. 1. [Grants to the Omaha and Southwestern Railway Company a right of way through and across certain specified streets and alleys, including Eleventh street.]

"Sec. 2. Said Omaha and Southwestern Railway Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided, that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and, provided, that nothing herein contained shall be construed

as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated." (Rec. 70.)

Soon thereafter the plaintiff in error constructed its line across Eleventh street, alongside of some twenty tracks of the Union Pacific Railroad Company previously laid. We come now to the construction of the viaduct in question, popularly known as the "Eleventh Street Viaduct."

In 1885 the Nebraska legislature passed an act "to provide for viaducts, bridges and tunnels in certain cases in cities of the first class," (Laws 1885, Ch. 12) commonly known as the "viaduct act," which is as follows:

"Sec. 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

"Sec. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor together with the estimated cost of the work, and thereupon, if the railroad company or companies across whose tracks or switches the work is proposed to be built, will assume three-fifths (3-5) of the entire cost thereof, and three-fifths (3-5) of all damages to abutting prop-

erty on account of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1-5), then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth (1-5) by special tax to property benefited, as provided in the following section, if not otherwise provided for.

"Sec. 3. The money necessary to pay two-fifths (2-5) of the entire cost of any such viaduct, bridge or tunnel, which the city is to bear, shall be raised as follows, viz: one-fifth (1-5) of the entire cost of the work, or so much thereof as shall be covered by special benefits, shall be paid by special assessment or special taxation of real property benefited by said improvement, which benefits shall be appraised and assessed by the mayor and council upon property benefited, and according to benefits, and in such manner as said mayor and council shall direct and determine; such assessment to become due and payable within fifty days after the levy is made; and the payment of all such assessments shall be enforced in the same manner, and with like penalties for delinquencies, as are provided in the case of special assessments for the paving of streets in such city. And the remainder one-fifth (1-5) together with two-fifths (2-5) the cost of damages to abutting property, required to be paid shall be paid by said city, and shall be paid out of a special fund created and raised for the purpose of defraying the cost of such improvement, and by a tax on all the taxable property within the city; and such

tax to be levied when ordered by the mayor and council, and payable at the same time as the city taxes for general city purposes.

"Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel, as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions, and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel.

"Sec. 5. Before entering upon the construction of any work contemplated by this act, the said mayor and council shall provide for assessing and appraising the damages, if any, sustained by property abutting upon such improvements, from which appraisal of damages the owner shall have the right of appeal to the district court, as now provided by law in similar cases. The proceedings for ascertaining any such damages shall be the same as provided for in case of the change of grade of streets. And said damages shall be paid by the city, as provided in sections two and three of this act.

"Sec. 6. The mayor and council of any such city shall have the power to pass any and all ordinances, not in conflict with this act, that may be necessary or proper for the construction, maintenance and protection of the works herein provided for."

In accordance with the above act during the following year a tripartite agreement was made between the Union Pacific Railway Company, the plaintiff in error and the city of Omaha. It is claimed by the plaintiff in error that this contract created an obligation upon the city to repair the viaduct therein pro-

vided for. So far as it is pertinent to this controversy I now quote the contract. (Rec. 65.)

"* * * Witnesseth, that the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska entitled, 'An act to provide viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions; such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000); the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha and Southwestern Railroad Company. * * * The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part; and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages in the same manner, and according to the same division, as hereinbefore agreed. * * *"

In 1887 the viaduct was completed and thrown open to the use of the public, and later in the same year the city of Omaha took its charter as a city of the metropolitan class. Section 48 of the new charter related to viaducts and was amended in 1893 so as to read as follows:

"Sec. 48. The mayor and council shall have power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, re-construct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, re-construct, or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, re-construct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, re-construct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, re-construct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, re-construction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, re-construction or repair of such viaduct or viaducts against the property of the railroad company or companies required to

erect, construct, re-construct or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court." Sess. Laws 1895, p. 70, c. 3, § 7.

The foregoing is the act the enforcement of which by the state court the plaintiff railroad company claims impairs the obligation of its contracts with the city and state, takes its property without due process of law, and denies it the equal protection of the laws.

In 1894 the city council passed its ordinance No. 3752. (Rec. 64.) The ordinance is as follows:

"Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh street viaduct be repaired as herein required; and

"Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore,

"Be it ordained by the city council of the city of Omaha:

"Sec. 1. [Approves the city engineer's plans and specifications for the repairs of said viaduct.]

"Sec. 2. [Directs and requires the Union Pacific Railway Company to repair the north two thirds of such viaduct and the plaintiff railroad company to repair the south one-third thereof, in accordance with the said plans and specifications.]

"Sec. 3. [Directs the city clerk to furnish the said railway companies with a duly certified copy of the ordinance, and directs the city engineer to furnish to each of them a copy of said plans and specifications, and also to superintend the work of making said repairs.]"

The plaintiff in error having refused to comply with the requirements of the ordinance these proceed-

ings were begun and successfully prosecuted through the highest court of the state of Nebraska whence they are brought to this forum under the claim that rights guaranteed to the unsuccessful party by the constitution of the United States have been denied it.

To complete the statement of the case it is only needed to add to the foregoing a reference to the special allegations made by the plaintiff in error in its various pleadings as a basis for invoking the jurisdiction of this court over the judgment of the state court.

The jurisdictional allegations in the pleadings in the district court of Douglas county. In the railroad company's answer to the application for the writ of mandamus it set up as paragraph nine (Rec. 14) the tripartite agreement above mentioned, and in a later paragraph (Rec. 20) it "submits that it is not competent for the legislature to impose upon it the duty of maintaining or repairing the Eleventh street viaduct, for the reason that to do so would be in violation of the obligations of the contract hereinbefore recited and contrary to the provisions of the constitution of the United States."

The seventeenth paragraph of the same answer (Rec. 17) is as follows:

"Seventeen. The respondent further alleges that the viaduct aforesaid covers a space on Eleventh street of about twelve hundred fifty (1,250) feet, of which about 400 feet is occupied by the several tracks owned or operated by the railway companies above referred to; that the remainder of such space was, before the construction of the viaduct, somewhat oc-

cupied and used by the public for street purposes, and was, under the law, controlled and cared for by the city of Omaha; that the distance from the north line of the space occupied by the track aforesaid to the north line of the viaduct is about seven hundred feet, and this respondent submits that it is not competent for the legislature to put upon the railway companies the burden of maintaining or repairing that portion of the viaduct over such unoccupied space of the said street, as the city would, but for the existence of such viaduct, be required under the law to maintain and repair; that whatever the rule of law may be as to the construction of the viaduct, the city shall be required in any event to contribute such proportion of the entire cost of its maintenance and repairs as that part of the street under the viaduct it would in the absence thereof be required to maintain and repair bears to the entire part of the street occupied by said viaduct, and it is submitted that any law authorizing and empowering the relator to impose such costs upon the railway companies named in its petition is unconstitutional and void and an arbitrary and unwarranted exercise of legislative power and contrary to the settled policy of the state of Nebraska and in violation of the several provisions of the constitution thereof and of the United States."

The pleadings at *nisi prius* contain no other reference to any rights under the constitution of the United States.

In the motion for a new trial the petitioner in error made no other claim to rights under the constitution of the United States than the following:

"15. The court erred in holding that the charter of the predecessor of this respondent and an ordinance No. 729 of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska and the United States guaranteeing the inviolability of contracts. (Rec. 35.)

"25. The court erred in compelling this respondent to

arbitrarily repair one-third of the viaduct in controversy, when as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed Eleventh street under said viaduct, that requirement being arbitrary, unjust, inequitable, unreasonable and unconstitutional." (Rec. 35.)

The jurisdictional allegations in the petition in error to the supreme court of Nebraska. All the allegations relating to any constitutional question which were made in the petition in error to the state court are found on page 2 of the record, and are as follows:

"5. The court erred in holding that the provisions of section 48 of the charter creating cities of the metropolitan class, as amended in 1893, did not impair the obligations arising out of the contract between this respondent and the relator relative to the construction of the Eleventh street viaduct."

"7. The court erred in not holding section 48 of an act entitled 'an act incorporating metropolitan cities' etc., as amended in 1893 unconstitutional."

"9. The court erred in holding that the charter of the predecessor of this respondent and an ordinance, No. 729, of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska, and the United States, guaranteeing the inviolability of contracts."

"13. The court erred in compelling this respondent to arbitrarily repair one-third of the viaduct in controversy, when, as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed Eleventh street under said viaduct; that requirement being arbitrary, unjust, inequitable, unreasonable, and unconstitutional."

Provisions of the state constitution.

"Sec. 3. No person shall be deprived of life, liberty or property without due process of law."

"Sec. 16. No * * * law impairing the obligations of contracts * * * shall be passed."

"Sec. 21. The property of no person shall be taken or damaged for public use without just compensation therefor."

On the above record the plaintiff railroad company makes in this court the following assignment of errors:

"1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas county, Nebraska..

"2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

"3. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

"4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7, of chapter 3, Laws of Nebraska, 1893, it im-

pairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the constitution of the United States.

"5. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provision of the constitution of the United States.

"6. The decree or judgment is erroneous in that it deprives the Chicago, Burlington and Quincy Railroad Company of its property and confers it upon other persons for a private use, contrary to the constitution of the United States.

"7. The decree or judgment is erroneous in that it deprives the Chicago, Burlington and Quincy Railroad Company of its property without making just compensation therefor, contrary to the constitution of the United States and in abridgment of the privileges and immunities of the Chicago, Burlington and Quincy Railroad Company, thus denying to it the equal protection of the law.

"8. The decree or judgment is erroneous in that it deprives the Chicago, Burlington and Quincy Railroad Company of its property without due process of law, contrary to the constitution of the United States."

PRESENT CONTENTIONS.

By its united motions to dismiss the writ for want of jurisdiction and to affirm the judgment of the state court, the defendant in error raises these contentions:

First. That this court is without jurisdiction

for the reason that the record does not show a case within the purview of section 709 of the Rev. St.

Second. That conceding the cause to be within the jurisdiction of this court, the judgment of the state court should be affirmed on motion, for the reason that the question on which the jurisdiction depends is so frivolous as not to need further argument; that paragraph 5 of rule 6 of this court should be applied to it.

I.

The record does not present a case within the purview of Sec. 709 Rev. St. inasmuch as (1) the law requires that the constitutional right relied upon in this court should have been properly set up or claimed in the state court; (2) and such requirement is not met in this case.

(1) *The law relating to the requirement that the constitutional right should be properly set up in the state court.* Sec. 709 confers jurisdiction upon this court to re-examine the final judgment of the highest court of a state *inter alia*, "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution of * * * the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution of * * the United States, and the decision is against the title, right,

privilege or immunity *specially set up or claimed*, by either party, under such constitution. * * *"

The subject has been so frequently considered by this court that it is not now an open question that the constitutional right relied upon in this court must have been first set up or claimed in the state court at the proper time and in the proper way. Nor in the light of the numerous decisions is it difficult to determine what constitutes a proper time and a proper way to set up or claim the right in the state court.

In a recent case (*Morrison v. Watson*, 154 U. S. 111, S. C. 14 Sup. Ct. Rep. 995) where the question involved was the impairment of a contract obligation by a state statute, this court, speaking by Mr. Justice Gray, said:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege, or immunity claimed under the constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court, or if it was not claimed in any form before judgment in the highest court of the state, it cannot be asserted in this court. Rev. St. § 709; *Spies v. Illinois*, 123 U. S.. 131, 181, 8 Sup. Ct., 21; *Brooks v. Missouri*, 124 U. S., 394, 8 Sup. Ct., 443; *Chappell v. Bradshaw*, 128 U. S. 132, 134, 9 Sup. Ct., 40; *Brown v. Massachusetts*, 144 U. S. 573, 1 Sup. Ct., 757; *Bank v. Bolong*, 150 U. S. 85, 14 Sup. Ct., 24; *Miller v. Texas*, 14 Sup. Ct., 874."

The fact that the foregoing principle was stated and applied in a case where the only claim of a fed-

eral question was the alleged impairment of a contract obligation, must be regarded as in substance deciding that the validity of a state statute is not drawn in question on the ground of its being repugnant to the constitution of the United States, unless such repugnance is specially set up or claimed in the same manner and at the same time required in the case of any other title, right, privilege or immunity conferred by the federal constitution.

In the *Anarchists' Case*, 123 U. S. 131, S. C. 8 Sup. Ct. Rep. 31, it was said by Mr. Chief Justice Waite:

"Something was said in argument about an alleged unreasonable search and seizure of the papers and property of some of the defendants, and their use in evidence in the trial of the case. Special reference is made in this connection to the letter of Most about which Spies was cross-examined; but we have not been referred to any part of the record in which it appears that objection was made to the use of this evidence on that account. And upon this point the supreme court of the state, in that part of its opinion which has been printed with the motion papers, remarks as follows: 'The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police, and should then have moved to exclude or oppose its admission on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved.'"

"Even if the court was wrong in saying that it did not ap-

pear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under section 709, Rev. St., because of the denial by a state court of any title, right, privilege, or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time, and in the proper way. To be reviewable here, the decision must be against the right so *set up or claimed*. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment of errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of a right under the constitution, laws, or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence, is not before us, and therefore no foundation is laid under this objection for the exercise of our jurisdiction."

And in *Gray v. Coan*, 154 U. S., 589, 14 Sup. Ct. Rep., 1168, the syllabus of the case reads:

"The supreme court has no jurisdiction to review the judgment of a state court on writ of error, unless it affirmatively appears from the record, that a question under section 25 of the judiciary act was made by the pleadings, and passed on by the court."

From the two foregoing decisions, it is plain that in order to be available here the constitutional right must have been set up and claimed not only in the supreme court of the state, but also in the trial court.

The same rule is stated in the foregoing quotation from *Morrison v. Watson, supra*, together with the reason of the rule, viz: that the state supreme court can only review such matters as have been passed upon by the lower court. In this connection it is pertinent to inquire into what is the "law and practice of the state of Nebraska as declared by its highest court" touching the review of proceedings in the lower court. In *Harrington v. Latta*, 23 Neb., 98 that court said:

"We take it to be the well established law of this state that a motion for a new trial is necessary to obtain a review of the case on error in this court, and that the errors relied on should have been specifically pointed out to the district court."

And in *Norton v. Nebraska Loan and Trust Co.*, 40 Neb., at page 398 it was said:

"The motion to vacate the order of confirmation and set aside the sale, filed in the lower court, contained but two reasons for so doing, one being that the property was not advertised as the law requires, and the other that the purchaser was deceived by the sheriff and clerk of the district court as to liens and encumbrances and as to the title he would acquire by purchase at the sale, and did not raise the question of whether any bid was made by Norton, and if so, whether the bid was a conditional one, and this latter question is not presented in either the motion for a new trial or the petition in error, and, in accordance with the well established rule of this court, it cannot be considered here. (*Chicago, St. P. M. & O. R. Co. v. Lundstrom*, 16 Neb., 263; *Cruts v. Wray*, 19 Neb., 581; *Harrington v. Latta*, 23 Neb., 98; *Hurford v. Baker*, 17 Neb., 446. See, also, *Smith v. Spaulding*, opinion filed May 2, 1894, in which it was held: 'Parties will, as a rule, be restricted in this court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction.')"

There can be no question that according to the law and practice in the state of Nebraska no alleged error can be considered by its supreme court that has not been first pointed out in the motion for a new trial in the lower court. The logical conclusion is that the federal right must have been specially set up or claimed in the motion for a new trial in the original court in order that this court may have jurisdiction to review on error the judgment of the supreme court of Nebraska.

I turn now to still another point required in the specially setting up and claiming of the constitutional right. In *Endowment Assn. v. State of Kansas*, 120 U. S. 103, S. C. 7 Sup. Ct. Rep., 499, it was attempted to support the jurisdiction of this court on this allegation contained in the motion for a new trial in the lower court. "1. That said chapter 131 is unconstitutional and void." But Mr. Chief Justice Waite in the opinion said:

"From this statement it is clear that we have no jurisdiction, as no federal question appears affirmatively on the face of the record. It is true that in the motion for a new trial the question of the constitutionality of chapter 131 of the Act of 1885 was presented, but that is not enough, since it is nowhere shown that any provision of the constitution of the United States was relied on. The suggestion in the motion applies as well to the constitution of the state as to that of the United States, and it has long been settled that we have no jurisdiction unless it appears that a question under the constitution or law of the United States not only might have been but actually was raised and decided. *Crowell v. Randell*, 10 Pet. 368, 398; *Brown v. Colorado*, 106 U. S., 95, 97; S. C. 1 Sup. Ct. Rep., 175; *Chouteau*

v. Gibson, 111 U. S., 200, S. C. 4 Sup. Ct. Rep., 340, *Detroit City Ry. Co. v. Guthard*, 114 U. S., 133, S. C. 5 Sup. Ct. Rep., 811.

From that decision it is plain that the mere general objection that a statute is unconstitutional, does not challenge its agreement with the constitution of the United States. This rule must be specially applicable where the federal and state constitutions contain similar provisions. The constitution of the state of Nebraska contains the following:

"Sec. 3. No person shall be deprived of life, liberty or property without due process of law."

"Sec. 16. No * * * law impairing the obligation of contracts * * * shall be passed."

The last requirement in this regard to which I call attention is that a mere formal allegation that a state law is repugnant to the constitution of the United States is not of itself such an allegation of a federal question as will support the writ of error to the state supreme court. There must be some facts set up which will make a reasonable basis for the allegation. The special statement of this principle is found in *City of New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, S. C. 12 Sup. Ct. Rep., 145, where it was said:

"While there is in the amended and supplemental answer of the city a formal averrment that ordinance No. 909 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averrment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal

question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay. Thus in *Millanger v. Hartupee*, 6 Wall., 258, it was held 'that to bring a case within that provision of the judiciary act, which declares that the final judgment of a state court may be re-examined, where is drawn in question the validity of an authority exercised under the United States, there must be something more than a bare assertion of the exercise of authority.' In delivering the opinion of the court the chief justice observed: 'The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims and authority under the United States. In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and, on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decisions of the state court, that the right or claim did exist.' This language was used in connection with the first clause of section 709 of the Revised Statutes, 'Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity,' but it is equally applicable to the next clause, which covers the case under consideration, 'Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity.'"

"Applying the principle of this decision to the present case, we think that, before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment and some ground to believe that it has been impaired; and that, to constitute a violation of the provisions against depriving

any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."

In line with the decisions above quoted from are the following:

POWELL V. SUPERVISORS, ETC., 150 U. S. 433, S. C. 14 Sup. Ct. Rep., 168.

CHOUTEAU V. GIBSON, 111 U. S. 200, S. C. 4 Sup. Ct. Rep., 340.

ADAMS COUNTY V. B. & M. R. R. CO., 112 U. S. 123, S. C. 5 Sup. Ct. Rep., 77.

DETROIT CITY RY. CO. V. GUTHARD, 114 U. S. 133, S. C. 5 Sup. Ct. Rep., 811.

OTIS V. OREGON STEAMSHIP CO., 116 U. S. 548, S. C. 6 Sup. Ct. Rep., 524.

SAYWARD V. DENNY, 158 U. S. 180, S. C. 15 Sup. Ct. Rep., 777.

CHEMICAL NAT'L BANK V. CITY BANK, 161 U. S. 1, 16 Sup. Ct. Rep., 419.

SUMMARY.

The requirements as to the proper setting up or claiming of the constitutional right plainly stated by the above decisions are there:

1. The right must be claimed in the trial in the *nisi prius* court by pleadings or exceptions duly taken to rulings; for otherwise there is no error in that regard committed by the trial court.

2. It must also be relied upon in the motion for

1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provision of the constitution of the United States.

The claim here indicated was made in the plaintiff in error's pleading in the trial court, but was abandoned in the motion for a new trial (Rec. 35). Hence, as we have seen it was not properly before the state supreme court for adjudication.

But there is a still more serious objection to its consideration here which I will point out later.

"4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the constitution of the United States.

This is merely the statement of the previous claim under a slightly different form, and is subject to the same objections which were made to it.

"3. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States."

While this claim appears in substance in the

motion for a new trial and in the state court petition in error, it is not found anywhere in the pleadings nor in the proceedings during the trial of the case. The trial court could not deny this constitutional right for the reason it was not claimed before it until after the trial. The trial court did not rule upon it during the progress of the trial and consequently committed no error in refusing to grant the new trial on that ground.

"2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error crosses Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereof, was located and constructed, contrary to the constitution of the United States."

What has been said of the 3rd assignment of error applies to this one.

"1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas County, Nebraska."

I have said that to the claims that the legislation in question impaired contract obligations there is a more serious objection than that the claims were not set up in all the necessary places for making them. *They are mere formal averments wholly unsupported by any facts to give even color for asserting them.* The plaintiff in error at different times claims an

obligation rested upon the defendant in error not to require it to repair the viaduct in question, under two distinct contracts. First, it says the city was bound not to call on the railroad company to make these repairs by the viaduct contract. But an inspection of the contract (Rec. 65) fails to disclose any such agreement. Secondly, it says that the city was precluded from making that requirement of the railroad company by the terms of the latter's charter and an ordinance No. 729. On examining the charter and the ordinance, it is seen that there is no such restriction, but on the contrary, the charter (Sec. 103, see *supra*, p. 3) expressly provides that the railroad company shall maintain its bridges.

The record shows nothing as to an invasion of federal rights except the naked averment that they are invaded. According to the law as declared by this court, that is not a sufficient setting up of a federal question. (*City of New Orleans v. New Orleans Water Works Co., supra.*)

For the foregoing reasons it is respectfully submitted that the writ of error herein should be dismissed.

II.

Conceding this case to be within the jurisdiction of this court the judgment of the state court should be affirmed on motion as provided in paragraph 5 rule 6.

Counsel for defendant in error believe that the

law as declared by the decisions of this court necessitates the dismissal of the writ of error herein for want of jurisdiction. But if in the opinion of the court he is mistaken in that belief he respectfully urges that the judgment of the state court be affirmed under rule 6, paragraph 5, of the rules of this court.

If the writ is not to be dismissed, the language of Mr. Chief Justice Fuller in *New York and N. E. Ry. Co. v. Town of Bristol*, 151 U. S. 556, S. C. 14 Sup. Ct. Rep., 440, while speaking of jurisdiction in that case, is directly applicable.

"The principles to be applied in its exercise are "so well settled that further argument is not needed, "and * * * this being so, the jurisdic- "tion may be said, under the circumstances to rest on "so narrow a foundation, as to give color to the "motion to dismiss, and to justify the disposal of the "case on the motion to affirm."

A part of the claims upon the jurisdiction of this court in this cause are frivolous because they have not even a color of foundation, and the remainder are frivolous because similar claims under similar facts have been repeatedly adversely adjudicated.

If it is admitted that all the grounds of jurisdiction set up in its assignment of error herein by the plaintiff in error, were set up at the proper times and in the proper ways in the state courts, they present to this court the following propositions:

(1.) That the viaduct act and the city ordinance No. 3752 carrying it into effect impair the obligation imposed upon the city by the viaduct contract.

(2.) That said act and said ordinance impair the obligation imposed upon the state by the railroad company's charter and city ordinance No. 729.

(3.) That the judgment of the state court deprives the plaintiff in error of property and confers it upon other persons for a private use.

(4.) That such judgment deprives the railroad company of its property without making just compensation therefor.

(5.) That such judgment in effect denies to the railroad company the equal protection of the laws.

(6.) That such judgment deprives the railroad company of its property without due process of law.

There are no contract obligations for the repair of this viaduct by the city.

(1.) *As to the viaduct contract.* The most careful examination of that contract will not disclose any stipulation or agreement in regard to the repairing of the structure. The ingenious contention made below by the railroad company's counsel was that the viaduct when built, became a part of Eleventh street; that the law required the city to keep its streets in safe condition; and that such law entered into the viaduct contract as a part thereof; hence the city by the execution of the contract became bound to keep the viaduct in repair. The obvious answers to that claim are, that the statute law requiring railroad companies to maintain and keep in good repair their bridges over any road or other way (Sec. 103, Chap. 25, Rev. St.

Neb., 1866 (quoted *supra*) and the law requiring the railroad companies not to imperil the public convenience and safety, also entered into the contract; and also that the city fully performs its duty to keep the street safe when it compels the railroad company to keep its crossing safe. Giving the defendant every advantage that could be claimed for its position and treating its sophistry as sound reasoning, the situation would be this: the railroad company understood that the burden of repairing the viaduct when constructed would be cast upon the city, and the city understood that such duty would be upon the railroad company under the general law of the state. In such a state of facts there can be no agreement—no meeting of the minds of the parties—no contract obligation.

(2.) *As to the charter contract and ordinance No. 729.* In what way the charter of the railroad company and ordinance No. 729 imposes upon the city any obligation to repair the Eleventh street viaduct has never been pointed out, even in the arguments of the counsel making the claim. The charter, as has been already noted, expressly provides that "every railroad corporation shall maintain and keep in good order" all its bridges." (Ch. 25, Sec. 103, Rev. St. Neb., 1866). As to the ordinance, (Rec. 70) it merely grants to plaintiff in error the right to construct its line across that street and provides that the tracks shall be constructed so as to conform to the grade of the street as near as may be, and so as to interfere as little as possible with the travel upon the

street. If the point is that permission to make a grade crossing when a track is laid constitutes a contract that the railroad company shall always have the right to retain such crossing, the proposition is so plainly untenable that neither authority nor argument is required to disprove it.

New York & N. E. Co. v. Town of Bristol, 151 U. S., 556, 14 Sup. Ct. Rep. 437 rules the case at bar.

There is not a material contention made by this plaintiff in error that was not made and decided adversely to it in the above case, under facts of such similar import that the law of the one case must be taken as the law of the other. It is true that there was reserved to the Connecticut legislature a power to alter and amend the railroad's charter which is not found in the case at bar. But the decision referred to is made upon a fundamental principle, deeper and broader than that furnished by expressly reserved powers. Says Mr. Chief Justice Fuller:

"It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection can not be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S., 659; *Barbier v.*

Connelly, 113 U. S., 27, 5 Sup. Ct. 357; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 650, 6 Sup. Ct., 252; *Mugler v. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct., 468."

And again quoting the final paragraph of the opinion:

"The conclusions of this court have been repeatedly announced, to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; * * * that there is no unjust discrimination, and no denial of the equal protection of the laws, in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interests, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of infraction of the constitution of the United States. *Railway Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct., 28; *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct., 47; *Railway Co. v Beckwith*, 129 U. S. 26, 9 Sup. Ct., 207; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct., 231; *Railway Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct., 255; *Railroad Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct., 870."

Upon no material ground can the plaintiff in error

differentiate its case from the above mentioned case. It is true the decided case is one of moving a railway crossing and the case at bar relates to a viaduct over such a crossing. But those particulars are incidental and immaterial features of the substantial thing—the protection of the public at railway crossings—which is the fundamental fact in both cases. Nor in this regard is there any distinction to be made between building a viaduct and repairing a viaduct. The reasons which would necessitate construction will necessitate maintenance. The railroad's duty to the public is continuing and not ended by any one act, and the power to compel the building of viaducts is not exhausted when exercised once. If the state can require the railroad to build one viaduct, it can require it to replace it with another when the first is worn out; and on the same grounds it can require it to keep the first one in a condition to serve the purpose of its construction.

Mr. Chief Justice Post in the opinion of the state court herein (Rec. 84) says:

"To summarize briefly, we conclude from the foregoing authorities and many others examined that the legislation assailed in this cause is a *valid* exercise of the police power of the state over the subject to which it applies."

And the last repeatedly announced conclusion of this court enumerated by Mr. Chief Justice Fuller in the quotation above made is:

"That the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state *is valid*, will not be reversed by this court, on

the ground of an infraction of the constitution of the United States."

In conclusion, I respectfully urge that the questions here raised are no longer open questions; and that they have been so fully and so frequently considered by this court that no further argument upon them is needed or justifiable. It is submitted that if the court retains jurisdiction herein it should only be exercised to affirm the judgment of the state court.

W. J. CONNELL,

Attorney for the Defendant in Error.